1927

# What Price Prohibition

Clarence Emmett Manion
*Notre Dame Law School*

# THE NOTRE DAME LAWYER

**A Monthly Law Review**

*"Law is the perfection of human reason"*

**Volume II** **JANUARY 1927** **Number 3**


# WHAT PRICE PROHIBITION?

By CLARENCE MANION

The old adage to the effect that there is nothing new under the sun, has for its counterpart the assertion: "History repeats itself." It implies that the path of our civilization is circular and that upon this tremendous circumference is to be found every kind of scheme and plan for the association of human beings on this earth. Proverbially therefore, humanity—perhaps for the very reason that it is humanity—is penned in, circumscribed, if you will, by natural limitations. It makes its pitiful little journey around the great beaten track and then, if it moves at all, it moves only to retrace its steps. Progress thus eventually becomes reaction, and reaction, progress.

With this general observation I wish to apologize for the attempt to bring a discussion of the Prohibition question within the compass of a single paper. The principles, psychology, tendencies, and eventuations of Prohibition involve at once the sin of Adam, the arrogance of the Pharisees, the iron code of the Spartan Lycurgus, and the "divine right" of kings for which the devotees of Socialism would apparently substitute the divine right—or at least the supreme right—of Society. To speak fundamentally of Prohibition is consequently a mammoth undertaking, but to speak of it superficially is worse than not speaking at all. However, I am encouraged by the assurance that in these enlightened presence mere reference will often be a good and sufficient proxy for explanation. This expedient will doubtless save my time and your patience.

The history of humanity from its beginning down to the time of our American establishment simply marks the slow painful emergence of the individual man from the general background of mankind. The tribe, the house, the race, the nobility, the king, and the state served respectively and in just about that order, to

throw the individual into almost total eclipse. The philosophy embodied in the expression, "The king can do no wrong", served each of these institutions in turn in the work of subordinating the private interests of the individual man to what was—in theory at least—the general interest of his kind. Christianity, with its benevolent doctrines of free will and individual responsibility to God, naturally came to grips with the old systems. Pagan Rome boasted of its religious tolerance in the dedication of the Pantheon, the temple of all the Gods. The Christians were persecuted not because they professed a different religion, but because in the eyes of the Roman authorities, the new religion implied a new theory of governmnt.

The succeeding centuries demonstrated that the early Roman view of Christianity was the correct view. Christianity maintained—and maintains—that God created each man, not merely all men. It insisted then, as it insists now, that each man has a personal responsibility to God and a liberty for the execution of that responsibility. This enunciation sent a deadly quiver into "the-king-can-do-no-wrong" theory. Pius philosophers wrote and talked of the rights which each man had from God; rights which, since they belonged to man by nature they could not be taken from him. Prominent among these rights are life and free will, and free will is merely the religious synonym for LIBERTY. In time most of the rulers were converted and by this same act they seriously compromised their time-honored prerogative. The individual thus emerged to the foreground but it was not until July 4, 1776, that he definitely arrived. On that day a new state was erected upon the "self evident" truth that the individual man is more important than the government, more important than society, more important than the king, more important than anything else in the world. Upon the foundation stone of this new state was carved the assertion that the Creator makes the individual man by the association of certain indispensable component elements such as *life* and *liberty*. When life is gone the man is dead. When liberty is subtracted from him he is no longer a man. The most important object of the temporal order therefore is to keep the man a man; to keep him alive until, by the invocation of natural causes, his Creator summons him; to keep him free, that he may choose his own path back to God from whence he came. Permit me to quote from the first, the fundamental American charter, the Declaration of Independence:—

"We hold these truths to be self-evident:—That all men are *created* equal; that they are endowed *by their Creator* with certain *unalienable rights;* that among these are life, liberty, and the pursuit of happiness. That, *to secure these rights* governments are instituted among men,—".

I think the recital thus far has been elementary and plain. We have seen that the individual is above and before the government or the state, or both: that the only excuse for the government is the jeopardy of the individual and the necessity for his protection in the possession of unalienable rights. Jefferson wrote and the United States subscribed to the assertion that these truths were self-evident in 1776. Information leads me to believe that there are many persons in and out of American public life to-day who are ready to admit that for the purposes of the American Revolution these truths may have been admitted to be truths then—but not now. And yet it must be conceded that truth is neither a matter of time nor opinion. Two times two equals four; it always has and always will whether we like it or not. The self-evident truth of 1776 may not have been truth at all. England has never admitted it nor does any other European state. Their constitutions and laws are not constructed upon this premise and they are therefore at liberty to disregard it. In Europe no individual has any right that his government is bound to respect; that is the same as to say that European governments are unlimited. Europeans are not free, they are merely on parole; only Americans are—or ever were—free. In Europe the *summum bonum* is an efficient government; in the United States the greatest desideratum is—or was—a free citizenry. This American idea is as revolutionary now as it was in 1776, but our condition of national development and prosperity is revolutionary also. Old fashioned people are inclined to think that the early establishment of the revolutionary idea has had all to do with the subsequent establishment of the very desirable revolutionary condition. Knowledge of the fact that in America one might hold his land, his money and his idea in spite of majorities, passions, and prejudices attracted the ambitious and the result is patent. The honest and better class preferred America naturally, as one prefers the harbor to the tempest. The full import of this idea is grasped by the most unassuming citizen, whether he pauses to think about it or not. Ask any American farmer why he doesn't sell his depreciating American land and go to Mexico where, for the money he

obtains, he may purchase a tract ten times as large and at least twice as fertile.

We cannot, therefore, cite foreign precedent for American political action. Europe is facing in a different direction. Our government can never hope to proceed with the thoroughness of Mr. Mussolini, nor God helping us a little—will it ever boast of the omnipotence of the British Parliament. Our government is an agent; a necessary evil if you choose; a parasite, living and functioning not because of the powers it has from God or nature, but by delegated authority of the people of the United States.

If what the Declaration of Independence states is a fact, then nothing more remains to be said or discovered upon that subject. We have made the circuit; we have circumnavigated the circumference. To go any further is simply to retrace previous plodding and unguided steps; to repeat historical errors. Progress that moves away from truth is reaction.

On the Fifth of last July our esteemed President, Mr. Coolidge, broke his cautious silence to speak some important truths. His address was the inaugural of the Sesqui-centennial celebration at Philadelphia. He said in part:—"Governments do not make ideals, but ideals governments. About the Declaration of Independence there is a finality that is exceedingly restful. If all men are created equal, that is final. If they are endowed with unalienable rights, that is final. If governments derive their just powers from the consent of the governed, that is final. No advance, no progress, can be made beyond these propositions. If anyone wishes to deny their truth or soundness, the only direction in which he can proceed historically is not forward but backward toward the time when there was no equality, no right of the individual, no rule of the people. Those who wish to proceed in that direction cannot lay claim to progress. They are reactionary. Their ideas are not more modern but more ancient than those of the Revolutionary fathers."

I agree with the President that if all men are created equal, that is final. If they are endowed with unalienable rights, that is final. And I would say this, too, that which the President for some reason omitted to say—that if "to secure these (unalienable) rights (of the individual) governments are instituted among men", that—by the same token as these other propositions—must be final too. Either we must repudiate the other propositions which the President

properly extols (and in repealing them plead guilty to fundamental errors in our national origin and organization), or in admitting them, admit that the purpose of American government was definitely and finally fixed by the language of the same Declaration of Independence.

Under the Constitution adopted in 1781 (The Articles of Confederation), the powers of the government—given to it for the purpose of securing these rights—were left almost entirely with the individual States. In the constitution of 1787 additional powers were given to the central government. But there was never any express or implied attempt to change the purpose of government, to make it any less dependent upon the consent of the governed, or to destroy the equality stated in the Declaration of Independence. In the case of *Hamilton vs. St. Louis,* (15 Mo. 13), the supreme court of Missouri many years ago said this:

"In considering State constitutions we must not commit the mistake of supposing that because individual rights are guarded and protected by them, they (the rights) must also be considered as owing their origin to them. These instruments measure the powers of the rulers but they do not measure the rights of the governed. What is a constitution and what are its objects? It is easier to tell what it is not, than what it is. It is not the beginning of a community nor the origin of private rights. It is not the fountain of law nor the incipient state of the government; it is not the cause but the consequence of personal and political freedom; it grants no rights to the individual but it is the creature of their power, the instrument of their convenience designed for their protection in the enjoyment of the rights and powers which they enjoyed before the constitution was made. . . . It (the constitution) presupposes property, personal freedom, a love of political liberty and . . . . (last but not least) . . . enough of cultivated intelligence to know how to guard against the encroachments of tyranny. A written constitution is in every instance *a limitation upon the powers of government in the hands of agents."* And in *Santa Fe vs. Ellis,* 165 U. S. 150, we read: "The latter (speaking of the Constitution) is but the body of which the former (the Declaration of Independence) is the thought and spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence."

Looking at the definition of a constitution given in *Hamilton vs.*

*St. Louis,* we naturally think of the Prohibition Amendment. In what respect is it *a limitation upon the powers of government in the hands of agents?* And in what respect does the Eighteenth Amendment secure the unalienable rights of any person? The Eighteenth Amendment is the first federal Constitutional provision that fails to square with the two above requirements. It does not limit the government, it limits the individual citizen. It does not secure liberty, it palpably takes liberty away. This is the sort of progress that President Coolidge called "reaction". It is abject surrender to an old and tyrannical order of utilitarianism. The proposition that a rose by any other name will smell as sweet is true also in its converse. The iron heel of despotism is not softened by the application of pretty names, nor by hasty, fanatical gestures calculated to make such despotism "constitutional". The fact remains that the Eighteenth Amendment inverts the declared purpose of this government. It establishes the paternity of the state and the consequent subjection of the citizen. It makes a principal of the agent and an agent or servant of the former principal. It re-establishes the old order from which we revolted in 1776, namely; that the subject has no right that his sovereign is bound to respect. If the citizen is to be legally bound down by the imposition of restrictive sumptuary legislation in the form of Constitutional amendments then what personal or property right remains to you that is exempt from the thievery of this despotic process? The Eighteenth Amendment is the margin of difference between freedom and tyranny, between the old world and the old order and the new world and the new order. Let us assume that it is the will of the majority; are you willing that your property should be surrendered in the same socialistic interest and by the will of the same kind of a majority? Prohibition is socialism in just the same sense that community ownership of property is socialism. The one is as red as the other. The prohibitionist represents himself as a lover of American liberty and traditions which the socialist, bolshevist, or communist perhaps does not. The prohibitionist is thus more dangerous than the so-called Red, in the sense that the swindler is always more dangerous than the highwayman. At the most solemn hour of this nation's history, Lincoln recalled the provisions of the Declaration of Independence at Gettysburg, and speculated upon the possible permanence of a nation dedicated to those principles. At that time the attack was being made

in the open—and it failed. If the Confederates—with less honor and more expediency—had veiled their purpose with the gloomy shroud of hypocrisy, perhaps they would have succeeded as well as the Prohibitionists have done.

The Eighteenth Amendment established the proposition that the American, like the European, has no right that his government is bound to respect. It puts a once free citizenship on a parole basis and gives it the assurance that all of its God-given rights are subject to arbitrary recall. It justifies the tyranny of George III and pardons the foolish deficiencies of his ministers. At the same time it gives the lie to George Washington, Thomas Jefferson, John Adams, James Madison, together with all the signatories of the Declaration of Independence and the entire Revolutionary army. It offers a belated apology to Great Britain, and those of you who have visited England recently know that the Englishman accepts it as such and is prodigal of his taunts.

Lincoln is authority for the statement that "the principles of Jefferson are the definitions and axioms of a free society". It was in his first inaugural address that Jefferson said: "With all these blessings what more is necessary to make us a happy and prosperous people? Still one thing more, fellow citizens, a wise and frugal government which shall restrain men from injuring one another, shall leave them otherwise *free* to regulate their own pursuit of industry and improvement." Many years later (June 7, 1816) in a letter to Francis W. Gilmer, the former president and author of the Declaration of Independence, said: "Our legislatures are not sufficiently apprized of the rightful limits of their power; that their true office is to declare and enforce only our natural rights and duties, AND TAKE NONE OF THEM FROM US. No man has a natural right to commit aggression on the equal rights of another and this is all from which the laws ought to restrain him. . . . The idea is quite unfounded that on entering into society we give up any natural right." That Prohibition violates the letter and spirit of these declarations is obvious from a statement of the one and a casual knowledge of the other.

It was not the purpose of American Independence to substitute the arbitrary right of majorities for the arbitrary right of a British Parliament. In Madison's Journal of the Constitutional Convention, Vol. 1, page 117, one of Madison's own speeches is paraphrased

as follows: "Interferences with these (private rights) *had more than anything else,* produced this convention. Was it to be supposed that republican liberty could long exist under the abuses of it practiced in some of the States? . . . In all cases where a majority are united in a common interest or passion the rights of the minority are in danger. What motives are to restrain them? (the majority)—A prudent regard to the maxim, that honesty is the best policy, is found by experience to be as little regarded by bodies of men as by individuals. Respect for character is always diminished in proportion to the number among who the blame or praise is to be divided. Conscience, the only remaining tie, is known to be inadequate in individuals; in large numbers, little is to be expected from it. Besides, religion itself may become a motive to persecution and oppression. These observations are verified by the observations of every country, ancient and modern. Why was America so apprehensive of parliamentary injustice? Because Great Britain had a separate interest, real or supposed, and, if her authority had been admitted, could have pursued that interest at our expense. We have seen the mere distinction of color made in the most enlightened period of time, a ground for the most oppressive dominion ever exercised by man over man. What has been the source of these unjust laws complained of? Has it not been the real or supposed interest of the major number? Debtors have defrauded their creditors. The landed interest has born hard on the mercantile interest. The holders of one species of property have thrown a disproportion of taxes on the holders of another species. The lesson we are to draw from the whole is, that where a majority are united by a common sentiment, and have an opportunity, the rights of the minor party become insecure. In a republican government, the majority, if united, have always an opportunity. The only remedy against them is to enlarge the sphere. . ." After this the Father of the Constitution explains at length why and how the distribution of powers between the federal government and the States will be best calculated to curb the injustices of majorities. Far, therefore, from exalting mere majorities, the intendment of the Constitution was to shackle them.

Here permit me to quote from Charles W. Pierson's book:

"Our Changing Constitution"—(Doubleday, Page & Co., 1922.)

"Could Washington, Madison, and the other framers of the

Federal Constitution revisit the earth in the year of grace, 1922, it is likely that nothing would bewilder them more than the recent Prohibition Amendment. Railways, steamships, the telegraph, telephone, automobiles, flying machines, submarines—all these developments of science, unknown in their day, would fiill them with amazement and admiration. They would marvel at the story of the rise and fall of the German Empire; at the growth and present greatness of the Republic they themselves had founded. None of these things, however, would seem to them to involve any essential change in the beliefs and purposes of men as they had known them. The Prohibition Amendment, on the contrary, would evidence to their minds the breaking down of a principle of government which they had deemed axiomatic, the abandonment of a purpose which they had supposed immutable. As students of government they would realize that the most fundamental change which can overtake a free people is a change in their frame of mind, for to that everything else must sooner or later conform. . . . . *The average man gives little thought to the constitutional aspects of the prohibition controversy. His interest in the prohibition movement is focused on features which seem to him of more immediate concern. And yet, did he but realize it, the constitutional aspect transcends all the others in its importance for the future welfare and happiness of himself, his children and his country.*"

When the Supreme Court of the United States ratified the Eighteenth Amendment in the so-called Prohibition Cases (253 U. S. 300), it did so over the official objection of two States of the Union and in spite of the forceful arguments of the best Constitutional lawyers in the nation. Among others, Mr. Elihu Root argued that the Eighteenth Amendment was inconsistent with the principles of the American government and the character of the Constitution. He mainained that the Constitution was not intended to be the repository of sumptuary and prohibitory laws annexed by way of amendment, but that it was supposed to be—and prior to this had always been—merely an assembly of fundamental principles. The Supreme Court affirmed the validity of the amendment, but for the first time in its history, it gave no reasons for its decision. Aside from the change that the Eighteenth Amendment makes in the character of the American government, the fact that its validity was secured by the establishment of this unreasoning and unreasonable

precedent on part of the court is deplorable. The late Justice McKenna said at the time: "The court declares conclusions only without giving any reasons for them. This instance may be wise—establishing a precedent now, hereafter wisely to be imitated. It will undoubtedly decrease the literature of the court if it does not increase lucidity." Compare this arbitrary practice with the detailed refinement of reason and explanation of Marshall, in Marbury vs. Madison, or McCulloch vs. Maryland. Compare this terse affirmative of the Supreme Court in this—the Eighteenth Amendment controversy, involving the most far reaching constitutional reform in our history, with the careful, complete, and logical decision of Taney in the Dred Scott decision. When the Dred Scott case was decided, swords were ready to be drawn and the very life of the republic was threatened by the contending parties. The result of the comparison is not favorable to the court as it was constituted at the time of the Prohibition decision. If Taney and his associates could defy Garrison and the Abolitionists, the judges of the 18th Amendment cases might at least have told us why they favored Mr. Wheeler and the Anti-Saloon League. A simple yes or no from the court of last resort is very close to arbitrary government—and this is one of the prices of Prohibition. It puts American citizens in the category of Tennyson's "Light Brigade": *"Their's not to reason why, Their's but to do and die."*

Every American Governmental authority, as we have seen, originally functioned with the consent of the governed and exercised only such power as it obtained from the people. Any act in excess of these grants would necessarily be meaningless and void. This is an elementary principle of agency that is well understood, even by laymen. Notwithstanding this applicable rule of construction, Americans, in rare jealousy of their rights, served upon every American government as it was created a list of express prohibitions known as a bill of rights. These bills which were made a part of the constitution of each State and later appended to that of the federal government, positively commanded that no express or implied power granted to the respective ruling authorities should ever be so construed as to violate the reserved rights which they described. It was further made plain that the statement of certain rights was not to be understood to imply the waiver of others not described or stated. The bill of rights was intended to prevent the

future violation of those liberties the spoilation of which by England had brought on the Revolution. The men who framed these bill of rights provisions had tasted the vinegar and gall of tyranny. As between anarchy and even a suspicion of renewed tyranny they showed a decided inclination in favor of anarchy.

Of all the rights which Revolutionary America sought to make inviolable, none was more unmistakably emphasized in the bill of rights than that which called for immunity from unreasonable searches and seizures. The violation of this right of immunity from search was one of the moving causes of the war for independence. In 1761, "writs of assistance" had been issued by the King's authority to the English customs officials engaged in locating smuggled goods. Armed with a writ an officer could search any house for contraband, though neither the house nor the goods was required to be mentioned in the warrant. American opposition to this measure was immediate and emphatic. James Otis held the office of advocate-general in Massachusetts at the time, but when the validity of the writs was questioned he immediately resigned and appeared for the people against the issue of the general warrants. In his speech to the court Otis called the writs of assistance "the worst instrument of arbitrary power" and "the most destructive of liberty ever found in an English Law book" since it placed, as he said, "the liberty of every man in the hands of every petty officer." In spite of this invective and the united colonial protest, the writs were upheld by the King's courts. This controversy was the very beginning of the struggle that ended in American independence. Consequently, in the bill of rights, this provision appears: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." (Am. Art IV, U. S. Const.)

Since they objected so strenuously to searches under a mere general warrant it is not probable that the framers of the bill of rights intended to sanction searches and seizures *without any warrant at all.* The language of the bill seems to indicate that any unwarranted search would be illegal and that before a warrant could be obtained for this purpose the requirements of oath, description,

etc., would have to be complied with. This was the construction relied upon for more than a hundred years. However, in *Carroll vs. United States,* (267 U. S. 132), the Supreme Court upheld the search of an automobile, made upon the mere suspicion that liquor was being transported therein contrary to the provisions of the Eighteenth Amendment and the Volstead Act, which search was made—not with a general warrant corresponding to a writ of assistance—*but without any warrant at all.* In this case, actuated undoubtedly by the necessity of enforcing the Prohibition Amendment, the court made certain distinctions between houses and automobiles that are not apparent on the face of the bill of rights provision, and thus moved the once solemn and emphatic protection against unreasonable searches over to the uncertain ground of reasonable and sufficient intentions on part of the searching officer. Recall what Otis said of the writs of assistance; that they were instruments of tyranny because "they placed the liberty of every man in the hands of every petty officer". In the enforcement of the Eighteenth Amendment the petty officer may proceed more brazenly than did his English predecessor. History does repeat itself, it seems.

The sixth article of the bill of rights is as follows: "In all criminal prosecutions the accused shall enjoy the right to a speedy *and public trial by an impartial jury. . .*" And in the fifth article of the bill we read: "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of Grand Jury. . ." In the Volstead Act, Section 21, any house, vehicle, structure or place that is used in violation of the Eighteenth Amendment is declared to be a common nuisance. In Section 22 of the same act it is provided that action to enjoin such nuisance may be brought by any prosecuting attorney. Such action is to be brought in any competent court of Equity, and that means, of course, that there is to be no jury trial. If the court finds that the material allegations of the complaint are true the injunction will issue. This means that the defendant may be forbidden to occupy the premises for one year thereafter. Subsequently, if the injunction is violated by the original party to it, or in some cases even by one not a party to it (76 Kan. 411) the violator may be punished with fine or imprisonment for contempt of court. This punishment for contempt is, of course, imposed without the concurrence of a jury. It has been held that the penalty for violation

of the injunction may exceed the punishment fixed by law for the violation of the act. (216 Ill. App. 519.) Thus for violation of the liquor law one may be fined and imprisoned without indictment and without a jury trial. It thus appears that Volstead violators need to be dealt with more drastically and more summarily than murderers or highwaymen. The latter, as yet, still have the right of indictment and jury trial. Yet the nuisance provisions of the Volstead Act and the drastic consequences to the bill of rights have all been upheld in *United States vs. Reisenweber,* 288 Fed. 520.

The last clause of Article Five of the bill of rights reads: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." This means that if a person is tried for a criminal offense and acquitted, he may not be subsequently tried again for that same offense. Or if he be tried, convicted and serves his sentence or pays his fine, he may not be retried and forced to serve another sentence or pay another fine as a punishment for the offense charged against him in the first trial. However, Prohibition cases appear to be exceptions. In *Herbert vs. Louisiana,* the Supreme Court has very recently held that the clause of the Eighteenth Amendment giving concurrent jurisidiction to the States and the federal government in the enforcement of Prohibition, makes an offense against that Amendment a crime against the jurisdiction of both the State and nation. One may, in other words, be tried, fined or imprisoned twice for committing a single crime against Prohibition. But, of course, this isn't double jeopardy; this is merely righteous law enforcement.

The heart of the bill of rights is gone. We have sold our national birthright for a miserable mess of Prohibition agents and spies. These latter may apparently shoot liquor offenders who attempt to escape capture, and if the agents are tried at all, they are tried, not as you and I would be, i. e., in the jurisdiction where the crime was committed, but by a federal court which ordinarily has no murder jurisdiction at all. But then some communities are reported to be unfavorable to Prohibition and these jurisdictions might deal harshly with agents who shoot drinkers to kill.

Recently in the State of Washington a bootlegger was raided by federal officers. One of the agents, in self defense, of course, shot the retreating bootlegger in the back and killed him. The prosecutor later dismissed the State's case against the agent. After all, the slain man was only a bootlegger and, of course, bootleggers

and their customers have no unalienable rights. Then too, it must be remembered that the officers were engaged in "law enforcement". Magic phrase! But John Hancock was technically a bootlegger, and the stamp collectors of Great Britain were undoubtedly engaged in law enforcement. Nevertheless, history does not record that the Boston Tea Party was staged because the tea was alleged to contain more than one-half of one-percent.

It is significant that there was a minister participating in the Washington raid to which I have referred. It is significant that the most militant Prohibition organization, The Anti-Saloon League, has for its leaders and directors, many ministers of various religious denominations. It must be admitted that religious leaders are intensely interested in this question of Prohibition; that they were most insistent that it be passed and that they are now most insistent that it be enforced. Prohibition is sometimes said to be an economic and not a moral reform. Yet the religious friends of the movement unhesitatingly call it a moral issue. Since they have been associated with Prohibition since its beginning they ought to know something of what it is all about. Let me quote from the most distinguished and most influential of them all. While speaking generally of Prohibition, Dr. Clarence True Wilson of Washington recently said this: "It is not evil in the abstract that the Church is dealing with but evil in the concrete. It does not usurp the methods of the State in dealing with them, but by applying Christian teaching and moral power to the problems, it (the Church) *unites its efforts* with the efforts of the State to get sin out of people's hearts and homes, out of our institutions and off our streets." Note that Dr. Wilson speaks of the Church. What church does he mean? He says that the Church unites its efforts with the efforts of the State. Is this then the union of Church and State that has ever been the awful spectre paraded ominously by various persons at various times? It is stated that the Church and State should unite to get sin out of people's hearts and homes. That is the business of religion but it is not the business of the State as its purpose is defined in the Declaration of Independence by the same person who separated Church and State in Virginia. The function of the State in America has simply been to keep the citizen free, so that in the exercise of that freedom he may worship wherever he pleases. I know that it will be unnecessary here to do more than mention the

patent inefficacy of law-made morality. In this connection, I will simply quote once more, and briefly, from Jefferson. In 1822 he wrote from Monticello as follows: "I look to the diffusion of light and education as the resource most to be relied on for ameliorating the condition, promoting the virtue and advancing the happiness of man. That every man shall be made virtuous by any process whatsoever, is indeed no more to be expected than that every tree shall be made to bear fruit and every plant nourishment. The brier and the bramble can never become the vine and the olive; but their asperities may be softened by culture and their properties improved to usefulness in the order and economy of the world."

Prohibition was, is, and has ever been a moral reform. Dr. Wilson admits that it is the attempt to secure the State's help in getting sin out of people's souls, and I think that we will all yield to him when it comes to a knowledge of the aims and purposes of Prohibition. But we can scarcely legislate morals without legislating dogma, and when we have legislated dogma we have united Church and State. We may honestly differ as to the merits or deficiencies of Prohibition, but upon *one* proposition I sincerely hope that all America is united to the *man,* and that is this: *We do not want the union of Church and State in this Country, now or ever.* But the establisment of the Prohibition principle makes such a union inevitable. Are you willing to pay the price?

Ours was, in the beginning, a federal republic. This was the establishment for which Madison successfully contended as a proper curb upon arbitrary powers of mere majorities. Because of the soundness of the local self-government principle our national domain now comprehends an area many times larger than the original territory of the United States and millions of citizens of all classes and kinds. This process of enlargement of territory and accommodation of different kinds of citizens to different kinds of conditions has been accomplished without friction because the very essence of our constitutional system is—or was—State home rule. As Mr. Bryce puts it in his American Commonwealth, we established "local government for local affairs; general government for general affairs only". Prohibition is a flagrant violation of this principle and Prohibitionists do not deny it. Permit me to quote from Mr. Wayne B. Wheeler in Current History for October, (1926).

"There was a time when Massachusetts had a little in common

with Virginia, and Rhode Island almost nothing in common with either. The Swedes of Delaware and the Highlanders of the Carolinas were of different blood, customs and speech from the Quakers of Pennsylvania or Oglethorpe's sons in Georgia. Traditions and religion carved this abyss of separation even deeper. The barriers of distance intensified it. An economic policy that might suit New York would prove disastrous to the Southern States. We had no organic Union and it was inevitable in that early age that we should be jealous of State rights. But this is 1926. State frontiers are only nominal. We thus set free the mind and spirit to deal with life in fuller measure. . . . . The tendency is toward more and not less federal action. Uniformity of legislation is alone thus obtainable on the more important questions that affect our welfare. This does not necessarily mean centralized government, but it does mean *standardization* under which we can best work out our problems."

Over and against this frank admission of Mr. Wheeler I desire to place a quotation from John Fiske, who is perhaps the most accurate chronicler of the Constitutional period of our history. This is from his "Critical Period of American History", page 301. He says:

"If the day should ever arrive (which God forbid) when the people of the different parts of our country shall allow their local affairs to be administered by prefects sent from Washington, and when the self government of the States shall have been so far lost as that of the departments of France, or even so far as that of the counties of England—on that day the progressive political career of the American people will have come to an end, and the hopes that have been built upon it for the future happiness and prosperity of mankind will be wrecked forever." Mr. Wheeler says in effect, that the day of which Mr. Fiske speaks has arrived, and that he, Mr. Wheeler, is very glad of it.

Prohibition was fastened onto the Constitution at the express command of the farm population of the United States. The metropolitan areas were and still are wet, but the great open spaces, if we are to believe the statisticians, were, and still are as dry as the proverbial covered bridge. There were no saloons to speak of in the hinterland but, yielding to that modern American impulse which directs us to mind the other fellow's business ever so much more seriously than we mind our own, the farmer was prompted to save

the city chap at all hazards. So it was then, now and ever shall be perhaps, that philanthrophy, unlike charity, seldom begins at home. But once enthroned, Prohibition proceeded to give the farmer the Judas kiss. In return for his favor and patronage it threatens to reduce him to peonage. For the last five years the loud speakers in the halls of Congress have amplified the wail of the wheat grower and the groan of the Corn Belt. Price fixing, subsidies, and artificial economics threaten to become incorporated into the law of the land. There is the gnawing problem with respect to the annual surplus of agricultural products. The experts tell us that the price of the surplus regulates the price of the entire crop, and it probably does. This interesting commentary from the report of the North Central States Agricultural conference is reprinted in the Congressional Record of July 16, 1926:

"A pitchfork could be purchased with a bushel of corn in 1914, today it costs two bushels of corn. A pair of husking mits required in harvesting this crop cost the farmer four bushels of corn in 1925 as against two bushels in 1914. Twice as much corn is now required for shoes, coal, overalls, working shirts, brooms, coffee and other necessaries. In short the exchange value of corn for what the farmer usually buys was 58 in 1925 as compared with 100 in 1914."

Scores of farmers have recently sacrificed their agricultural holdings and moved to the city. This has undoubtedly decreased the supply and increased the demand but the surplus continues. The surplus of corn for the fiscal year 1925-26 was 23,137,000 bushels, according to the figures of the United States Department of Agriculture.

Before the enactment of the Eighteenth Amendment there was a comparatively small whiskey distillery operating in Henderson, Kentucky. An inspection of its books reveals that an average of 50,000 bushels of corn per month was purchased by the establishment and made into liquor, or 600,000 bushels per year. According to the figures of the Anti-Saloon League there were upwards of 500 whiskey distilleries operating in the United States before Prohibition, but more conservative and official figures place the number at 434. The distillery I mention was probably one of the smallest in the country, but let us assume that it was average. 600,000 bushels of corn times 434 distilleries is 260,400,000 bushels of corn bought,

paid for and used annually in the distillation of American whiskey in the pre-Prohibition era. This demand would swallow up the present corn surplus and leave the distillers crying for more than 237,000,000 bushels more. It is not surprising that there are groans coming from the corn belt. Every time a farmer gives two bushels of corn for a pitchfork he is contributing one bushel for the benevolent blessings of Prohibition. Of course, the farmer doesn't know this and no integer of his exalted galaxy of congressional representation has taken the trouble to tell him about it. Instead, they fuss and fume about Haugen bills and seek to add another artificial regulation to supply deficiencies created by the first artificial regulation. When we tell one lie, it is usually necessary to tell a number of lies in order to square ourselves. What the distillers did for the corn grower, 1,276 breweries did for the rye, malt and cereal grain growers, and 318 wine presses for the grape and fruit cultivators.

Grain and fruits will spoil if kept beyond a certain time in storage. If made into alcohol they will keep indefinitely. Age—as perhaps some of you know—mellows and improves liquids containing a percentage of alcohol. From time immemorial this has been Nature's way of absorbing and preserving the surplus of her fruits, and at the same time encouraging the cultivation of such a surplus. What is needed for food goes for food but over and above food requirements there always has been and always should be a surplus. If we aimed directly at the food market and planted a restricted acreage to supply the food requirements and no more, we would have serious shortages in the off-weather and poor crop years. This accounts for the famines that occur at almost regular intervals in Oriental countries that have no alcohol industry to stimulate the production of a surplus margin of fruit and grain. Normally in the lean years, the supply that ordinarily goes into alcohol is permitted to go for food and thus famine and shortage is prevented. In the years of plenty the surplus is used by the alcohol industry and the prosperity of agriculture is thus made constant, not by artificial price-fixing institutions, but by the simple operation of Nature's law.

When our political and agricultural existence had been properly and thoroughly revolutionized the Prohibition movement was free to extend itself to other fields. Liquor advertisements are prohibited by the Volstead Act, and this has evidently been construed to

justify the mutilation of literature and history. All of us know of a patriotic song called "Columbia, The Gem of the Ocean"—Some of us have swelled to the cadences of the third verse:

"The wine cup, the wine cup bring hither,
And fill you it up to the brim,
May the wreathes they have won never wither,
Nor the star of their glory grow dim."

But forget it Gentlemen, the recollection is guilty knowledge. The approved Prohibition version, as it was recently published in "The Golden Book of Songs" (Hall & McCreary Co.—Chicago) is as follows:

*"The Star Spangled Banner* bring hither
O'er Columbia's true sons let it wave—etc."

The censor probably reasoned that the Star Spangled Banner is a good substitute even for the wine cup. George M. Cohan used to say "when the act begins to drag, bring in the American flag".

Some of you remember the lines in the rollicking chorus of the song "When Johnny Comes Marching Home"—"And we'll all drink stone blind when Johnny comes marching home". But such a mid-Victorian vulgarity is not to be justified under Prohibition, even on the occasion of Johnny's homecoming. The modern version as shown in the Golden Book is simply that "We'll all feel gay" now, "When Johnny comes marching home". It will be interesting to observe what happens when the Prohibition censor gets around to the "Rubaiyat", the Odes of Horace, or Ben Johnson's "Drink To Me Only with Thine Eyes".

There is one more price that we have paid for Prohibition and I wish to mention it casually. It is perhaps the very highest price of all, but its payment bears indirectly upon the enforcement of Prohibition and with that phase of the question, for the purposes of this paper at least, I am not interested. I wish to quote from Col. Margaret Bevill, territorial director of the Salvation Army social service in New York City. She says: "Twenty years ago, our rescue homes were always filled with women of mature age. From whatever source we found these women, however, they were, with only few exceptions, women who had deliberately chosen what has mistakenly been called 'the easiest way'. This is not the situation today. Red light districts have been largely done away with, so have the saloons with back rooms, and, between the police and the activi-

ties of the citizen's committee, we have practically eliminated open prostitution on the streets. In spite of these reforms, the Salvation Army in this one territory now has twice the number of maternity homes that it operated in those lurid days of the past, and they are all filled to capacity by whom? Not by professional, deliberate, and conscious violators of the social code, although we still work among that class too—but by school children, many of whom have been obliged to leave their desks in either the high or elementary grades to go direct to our institutions for the ordeal of motherhood."

This statement will serve to indicate what I have in mind. Our young American womanhood is rapidly becoming demoralized. I am not particularly interested in the testimony of college presidents on this point, nor that of politicians, neither am I comforted by the bombastic assurances of the chronic publicity hound. I am old enough to remember something of what Col. Bevill calls "the lurid day of the past", and am yet young enough to have some enlivening data with respect to the tendencies of the present social generation. Col. Bevill gives us facts and these facts are unusually significant. Years ago when spiritual restraints for the resistance to temptation were self-imposed and left to that tribunal known as the still small voice of conscience, I say years ago, in that "lurid" day, we bred a race of ladies and gentlemen. Now, when we have written our righteousness into State and Federal Statutes and by that same token, made all of our religious ministers, de-facto deputy sheriffs, we have well-nigh universal contempt for morals and the once universally accepted moral standards. It is as Senator Reed of Missouri says, "The fashionable swain, bottle on hip, is received in polite society. He presses his flask to the lips of a girl whose pre-Volstead mother would have scorned a boy with liquor-tainted breath".

There is a vicarious relationship existing between the spiritual and the legal restraint. When spiritual ends are sought to be enforced by legal prohibitions spiritual restraints go down. The jail house is much nearer than Heaven or Hell and when the sins of the flesh are responsible to the policeman's club, the said club throws God and his law into total eclipse. We have established a materialism in America and the philosophy of materialism is summed up in the expression: "Don't get caught." We can weather many disturbances, both political and social, but our civilization cannot pos-

sibly survive the wholesale demoralization of our potential motherhood. If Prohibition has done that, we are cashiered.

Let it be assumed then for the sake of this argument that Prohibition is as effective in fact as it is in law. Is the boon so precious that it justifies the inversion of the theory and purpose of the American government; the extinction of liberty; the repeal of the bill of rights; the disturbances ever consequent upon the disregard of the natural law; the repudiation of the Fathers of this republic; the centralization of our government and the destruction of the federate principle; the union of Church and State, the demoralization of our young womanhood and the impoverishment of agriculture?

To state the proposition is to answer it. If it had been clearly stated when this reform was agitated it would have been answered then—and emphatically. The American was not robbed of his liberties, he was cheated in a game that the fury of fanaticism represented to be fair. If the American public would lie down in passive obedience to the results of such a swindle they would not be worthy of this nation's history. The only reassuring thing that has come out of Prohibition is the emphatic, positive refusal of the American citizen to obey it. This resistance smacks of the spirit of '76. Legislatures and politicians may bow to the bludgeonings of special interests and indulge the sportive dissipation of our sacred inheritance, but when the full realization dawns upon the citizen he will demand his pound of flesh.

You may sing of the sanctity of the law and the horrors of mullification but just as Huck Finn realized that there was something wrong with a morality that told him to uphold slavery and yet love the runaway slave, so also does the American citizen realize the hypocrisy of an institution that means everything in public and nothing at all in private. He will recall that the Revolution was fought on the theory that the state may occasionally be wrong and he will see no good and sufficient patriotic reason why he should now cease to think, speak or act contrary to the spirit and purpose of the Eighteenth Amendment.

"What shall the end be? Will that race of men who for a thousand years have asserted the 'right of castle', rejected governmental interference in domestic affairs, proclaimed the right of the free man to regulate his personal habits in accordance with the law of conscience and love, now become subject to a self-imposed stat-

utory tyranny? Shall we endure a legal despotism, the equivalent of which would have provoked rebellion amongst the Saxons even when under the Norman heel?"

A few honest citizens drunk on beer are to be preferred to an army of corrupt officials drunk on arbitrary power. It is better, far better that all law made morality end than that all God-made liberty die. Prohibition assumes that our plan of government has not worked out and that it ought to be destroyed; the average citizen who has loved that form of government and fought for it in and out of the ranks is not prepared to accept the Prohibition theory. Sooner or later he will realize that as long as Prohibition is in vogue the goddess of American liberty is in chains. In effecting her liberation he may be expected to use such tools as come into his hands. Formally or informally, in justification of our history Prohibition with all of its contemptible unAmerican ramifications must go down—and it will go down.